BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Tax Court of Puerto Rico is not officially reported. The opinion of the Supreme Court of Puerto Rico, March 9, 1943, upon which judgment was entered the same day (R. 39-40), appears in the Advance Sheets of Volume 61 of the Spanish Edition of the Reports of that Court [61 *Decisions de Puerto Rico,* pp. 474-512; Advance Sheets of May 1, 1943], but has not yet appeared in the English Edition of the Puerto Rico Reports. An English translation is in the "Agreed Statement of the Case" here (R. 8-39).

The earlier opinion of the insular Supreme Court of Puerto Rico in this case, upon certiorari to the Court of Tax Appeals [which had dismissed this petitioner's appeal to it from the insular Treasurer, for supposed lack of jurisdiction in the Court of Tax Appeals], remanding the case to that Court for a hearing on the merits, July 23, 1942, appears in the Advance Sheets of the Spanish Edition, in the issue of October 1, 1942,—60 *Decisiones de Puerto Rico,* pp. 768-783; but not yet in the English Edition.

The opinion of the Circuit Court of Appeals (R. 52-69) appears in 142 F. (2d) 11 (Advance Sheets).

Jurisdiction.

As stated in the Petition (*ante,* p. 2), the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered on April 5, 1944.

Questions Presented.

The questions here presented are stated in the Petition "Questions Presented," (*ante,* pp. 23-31).

Statutes.

These are indicated in the Petition (*ante*, pp. 2-6), and pertinent parts are set out in the Appendix (*infra*, pp. 83-101).

Statement of the Case.

A statement of the case, with summaries of the opinions of the insular Supreme Court and the Circuit Court of Appeals, is in the Petition (*ante*, pp. 7-22).

Specification of Errors to be Urged.

These are indicated under the headings "Questions Presented" and "Reasons for Granting the Writ," in the Petition, *ante*, pp. 23-31, and 31-34).

Summary of Argument.

The argument is summarized under the headings "Questions Presented" and "Reasons for Granting the Writ" in the petition (*ante*, pp. 23-31 and 31-34), and in the "Subject Index" preceding the Petition.

ARGUMENT.

Point I.

3. The provision of Section 2 of the Organic Act, that:

"The rule of taxation in Porto Rico shall be uniform,"

requires inherent or intrinsic uniformity; not merely geographic uniformity "throughout the Island."

A. *To treat it as requiring* "geographical uniformity" *only, would be to deprive it of any separate meaning at all,* and as adding nothing to the requirements of "due process' and of "equal protection of the laws," contained in the first paragraph of the same Section.

B. Both the insular Supreme Court and the Circuit Court of Appeals were plainly in error in holding that merely "geographic uniformity" throughout the Island

is required; and, specifically, the Circuit Court of Appeals, in so holding, misapprehended and misapplied the decision of this Court in *Knowlton* v. *Moore*, 178 U. S. 41, 83 *et seq.* This decision of the lower courts is directly in conflict with the decision of this Court in that case.

Examination of the entire opinion of this Court in that leading case of *Knowlton* v. *Moore, supra*, 178 U. S. 41, taking it "by the four corners," shows that, so far from supporting the Circuit Court of Appeals' conclusion here, it is, in reality, directly against it, and directly, and conclusively, supports our position here.

Its reasoning clearly shows that it was the intent of the Congress in requiring by the clause of Section 2 of the Organic Act above quoted that the rule of taxation in Puerto Rico shall be *"uniform"*,—without adding any qualifying phrase, such as, "throughout the Island",—to make the requirement *absolute*, without qualification, that is to say that the rule should apply, broadly, to the persons taxed and the objects of taxation, as well as to the geographical jurisdiction of the local government. In other words, that the word "uniform" was intended by the Congress to mean and to include both "inherent uniformity," and also "geographical uniformity".

Very clearly this Court's decision in *Knowlton* v. *Moore* that the provision of the Constitution,—Article I, Section 8, Clause 1,

> "but all Duties, Imposts and Excises shall be uniform throughout the United States",

requires only geographical uniformity "throughout the United States", and does not require "inherent and intrinsic uniformity",—that is, that the Constitutional requirement does not relate "to the inherent and intrinsic character of the tax",—is expressly placed by the opinion of Mr. Justice White, speaking for the Court, on the very ground of the inclusion of the words *"throughout the United States"* in the clause, as well as upon the history of that

particular phraseology, and its relationship to the other provisions in the Constitution, particularly to the provision forbidding any preference being given between the ports of different States (Article I, Section 9, Clause 6). This Court says (*Knowlton* v. *Moore, supra,* 178 U. S. 41, 84, 87 *et seq.*):

> "The contention is that because the statute exempts legacies and distributive shares in personal property below $10,000, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first Clause of Section 8 of Article I of the Constitution, which provides 'the Duties, Imposts and Excises shall be uniform throughout the United States'.
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> "The argument to the contrary, *whilst conceding that the tax devised by the statute does not fulfill the requirement of equality and uniformity, as those words are construed when found in State constitutions,* asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provision in the Constitution, that 'duties, imposts and excises shall be uniform throughout the United States,' it is insisted has a different meaning from the expression equal and uniform, found in State constitutions. In order to decide these respective contentions it becomes at the outset necessary to accurately define the theories upon which they rest.
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> "On the one side, the proposition is that the command that duties, imposts and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that when an impost, duty or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to say, the proposition is that 'uniform throughout the United States' commands that excise, duties and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the

constitutions of most of the States of the Union. The contrary construction is this: That the words 'uniform throughout the United States' do not relate to the inherent character of the tax as respects its operation on individuals, but simply require that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform." (pp. 83-85; *Italics supplied*) * * *

"* * * It is apparent that the controversy cannot be disposed of by a mere reference to prior adjudications, since reliance is, by both sides, in effect, placed upon the same decisions. But to determine which view of the cited authorities is the correct one, it will become necessary not only to analyze the facts which were at issue in the decided cases, but also to elucidate the language of the opinions which have given rise to the conflicting constructions now placed upon such language, by an examination of the subjects to which the language related. As to do this calls for a critical consideration of the provisions of the Constitution referred to in the opinions relied on, we shall, for the moment, put the cases referred to out of mind, and consider the controversy presented as one of original impression. We are, moreover, impelled to this course from the fact that *as the word 'uniform', or the words 'equal and uniform', are now generally found in State constitutions, and as there contained have been with practical unanimity interpreted by State courts as applying to the intrinsic nature of the tax and its operation upon individuals*, if it be that the words 'uniform throughout the United States,' as contained in the Constitution of the United States, have a different significance, the reason for such conclusion should be carefully and accurately stated."

> "Considering the text, it is apparent that if the word 'uniform' means 'equal and uniform' in the sense now asserted by the opponents of the tax, the words 'throughout the United States' are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution."
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> "Taking a wider view, it is to be remembered that the power to tax contained in section 8 of article 1 is to lay and collect 'taxes, duties, imposts and excises. . . . But all duties, imposts and excises shall be uniform throughout the United States.' Thus, the qualification of uniformity is imposed, not upon all taxes which the Constitution authorizes, but only on duties, imposts and excises. The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts and excises, and it is not applicable to any other form of taxes." (pp. 87-88; *Italics supplied*)

The Court then, pursuant to the purpose indicated in the paragraph on page 92 of the opinion, upon which,—lifted from its context,—the Circuit Court of Appeals here relies [*ante*, p. 19], proceeds to examine the history of this Constitutional provision, in the Constitutional Convention, and with relation to the laws of England and of the various Colonies before that time, and the relation of this provision to the one in Clause 6 of Section 9 of Article I that

> "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.";

and concludes (178 U. S., *supra*, at p. 98):

> "Thus it is apparent that the expression '*uniform throughout the United States*' was at that time considered as purely geographical, as being synonymous with the expression 'general operation throughout the

> United States,' and that no thought of restricting Congress to intrinsic uniformity obtained, since the powers recommended were absolutely in conflict with such theory" (*Italics supplied*);

and that (pp. 105-106)

> "Thus it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the
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> sixth clause of section 7 of article 1, and the other is a part of the first clause of section 8 of article 1. By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity."

C. For the purposes of the present case the notable things about that opinion in *Knowlton* v. *Moore* are (1) that the reasons for holding that Constitutional provision of Clause 1 Section 8 of Article I, that all duties, imposts and excises shall be "uniform throughout the United States" requires "geographical uniformity" only, and not "inherent" or "intrinsic" uniformity, were primarily threefold; (a) the presence of the words "*throughout the United States*", to which it was to be presumed that the framers of the Constitution had intended a meaning should attach and that those words should not be disregarded; (b) the history of the Clause and of the phrase "throughout the United States" in the Constitutional Convention; and (c) its connection with the parallel clause in paragraph 6 of Section 9 of Article I prohibiting preferences among the ports of the different States,—all of these things together tending strongly to show that it was only geographical uniformity that the framers of the Constitution had in mind; and (2) that,—equally noteworthy,—the opinion shows that this Court clearly understood, and directly stated,—(in the

portions of the opinion which we have italicized in the foregoing quotation,—*ante*, pp. 38, 39):

> "the word 'uniform' or the words 'equal and uniform' are now generally found in state constitutions, and as there contained have been with practical unanimity interpreted by state courts as applying to the intrinsic nature of the tax and its operation upon individuals" (178 U. S., *supra*, pp. 84, 87).

That decision was handed down May 14, 1900. It has stood unchallenged ever since.

D. Seventeen years later, on March 2, 1917, the Organic Act of Congress for Puerto Rico was approved, containing the provision in its Section 2 (39 Stat. 951, 952):

> "That the rule of taxation in Porto Rico shall be *uniform.*" (*Italics supplied*)

That is,—"uniform"; without any modification or qualification whatsoever. Not "uniform throughout the Island"; nor any other modification or limitation. Plainly, the Congress must be presumed, in using that phraseology, to have done so in view of the decision of the United States Supreme Court in *Knowlton* v. *Moore;* and with MR. JUSTICE WHITE'S language in that opinion in mind.

The Circuit Court of Appeals itself, in its opinion here (R. 65) emphasizes the rule of this presumption, quoting from this Court's opinion in *Kepner* v. *United States*, 195 U. S. 100, 124 [1904], and citing also *Serra* v. *Mortiga*, 204 U. S. 470, 474, that "The guarantees which Congress has extended to Puerto Rico are to be interpreted as meaning what like provisions meant *at the time when Congress made them applicable to Puerto Rico.*" (Italics supplied.)

E. In other words, in using that single, unqualified, word "uniform", the Congress must be presumed to have intended to use it in the same sense in which Mr. Justice White had said in Knowlton v. Moore that word had come to be "with practical unanimity" interpreted by State courts

"as applying to the intrinsic nature of the tax and its operation upon individuals"; and, therefore, to have intended to adopt that interpretation and to use that word in the Organic Act with that meaning.

This is the rule recognized, as a matter of course, as the true interpretation to be placed upon the word "uniform" as used in their State constitutions by the Supreme Courts of Alabama, Illinois, Pennsylvania, Tennessee and Washington in the cases we have cited above [*infra*, p. 50], as well as in other States, where "with unanimity" as MR. JUSTICE WHITE phrased it in *Knowlton* v. *Moore*, *supra*, it is construed to mean "inherent" or "intrinsic" uniformity.

F. It has always heretofore been so construed in Puerto Rico,—apparently without question, until the decision of the insular Supreme Court in the present case.

It was so treated by the Circuit Court of Appeals itself [*as we respectfully submit, despite that Court's present interpretation of the Domenech opinion, in its opinion in this case;* R. 81], in *Domenech, Treasurer* v. *Havemeyer*, 49 F. (2d) 849, 852, where that Court's decision striking down a particularly flagrant violation was necessarily based upon that Court's understanding that, of course, the requirement that the rule of taxation in Puerto Rico shall be "uniform" necessarily implied the requirement of intrinsic or inherent uniformity.

That was followed by the decision of the insular Supreme Court itself in *Loiza Sugar Company* v. *Domenech, Treasurer*, 43 P. R. Rep., 855, 857-858, necessarily involving the same understanding.

And the Circuit Court's earlier decisions in *Gallardo* v. *Porto Rico Ry. Light and Power Co.*, 18 F. (2d) 918, 923, "(10)", and in *Sanchez Morales & Co.* v. *Gallardo*, 18 F. (2d) 550, 551-552, noted below [*infra*, pp. 54-57], necessarily, we submit, involved the same understanding.

Nor is there anything to the contrary in the decision of the Circuit Court, upon which both of the lower courts now rely, in *San Juan Trading Co.* v. *Sancho Bonet, Treasurer,* 114 F. (2d) 969, 972, where the Circuit Court, *arguendo,* simply recognized that the statute there before it fully complied with the requirement of *uniformity* in *both aspects,* that (a) it applied "equally in all parts of Puerto Rico"; and that (b) it also met the requirement of inherent or intrinsic uniformity, in that "all matches in each class are treated the same."

The insular Supreme Court itself, in the present case, *places that part of its decision striking down the discrimination against alien residents* of Puerto Rico, in the *excepting clause* of Section 12(a) as amended by the Act of May 13, 1941, *upon the very ground that it "violates* not only the equal protection provision of our Organic Act * * *, *but also the more specific proviso that the rule of taxation in Puerto Rico shall be uniform."* (R. 28-29.) [Inconsistently enough; perhaps from the pure force of habitual thinking of the uniformity clause as inherently applicable to all taxation in the Island.]

Point II.

The Legislature of Puerto Rico is without authority to levy income taxes upon a progressive graduated scale imposing higher percentages upon higher incomes, because the Legislature is bound by the iron rule which the Congress has seen fit to impose upon it by Section 2 of the Organic Act, "That the rule of taxation in Puerto Rico shall be uniform."

A. As pointed out by Mr. Justice White, in *Knowlton* v. *Moore, supra,* wherever the word "uniform," without further qualification, is used in State constitutions, that word, and the equivalent phrase "equal and uniform," "now generally found in State constitutions,"

> "as there contained have been *with practical unanimity interpreted* by state courts as *applying to the intrinsic nature of the tax and its operation upon individuals*". (*Italics supplied*)

B. *The decision in Knowlton* v. *Moore*, that the Congress is not bound by the rule of inherent or intrinsic uniformity, and may therefore levy progressive taxes [upon legacies in *Knowlton* v. *Moore*, and upon income taxes in the later following case of *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 25], for the reason that the Constitutional provision in Article I, Section 8, Clause 1, requires only geographical uniformity, *is bottomed upon the presence in that clause of the significant words* "throughout the United States," and upon the history of the clause as it is traced in the opinion in that case as above quoted.

Mr. Justice White noted that *the government's argument* in that case, in support of the power of the Congress to levy progressive taxes, on the ground that the Constitutional provision requires only geographical uniformity, *expressly conceded* that if the contrary interpretation of that clause were to be adopted, and it were to be held that the word "uniform" as there used were to be given the same construction given it "with practical unanimity" whenever used in State constitutions, to include "inherent" or "intrinsic" uniformity, then, as Mr. Justice White there said (178 U. S., *supra*, at p. 84; *ante*, p. 38), the progressive

> "tax devised by the statute does not fulfill the requirement of equality and uniformity, as those words are construed when found in State constitutions."

That is conclusive here, of the total lack of power of the Legislature of Puerto Rico to levy progressive taxes; just as it is (*infra*, Points III and IV) of its like lack of power to lay double taxation on corporate stockholders, and

on partners, in view of the use of the absolute and unqualified word "uniform," in the Organic Act.

That is not only the rule which, as MR. JUSTICE WHITE said in *Knowlton* v. *Moore*, has been "with practical unanimity" (*ante*, p. 39) applied by the State courts in interpreting the word "uniform" in State constitutions, but it is also the rule which has been specifically applied, among other cases, in those below cited by us from various State courts (*infra*, p. 50).

And, of course, as expressly held in the decisions of the various State courts below cited, and as was expressly conceded in the Government's argument in *Knowlton* v. *Moore*, that requirement of "intrinsic" or "inherent" uniformity forbids the local Legislature from levying progressive taxes.

The local Legislature of Puerto Rico does not possess the same power as the Congress in that respect. The Congress has chosen not to delegate that power to it; but, on the contrary, to limit its powers in this respect by this unqualified requirement of "uniformity" in Section 2 of the Organic Act.

C. It is, of course, immaterial that progressive rates were not first introduced into this statute by these 1941 amendments, but,—*at lower rates*,—had been contained in the Act ever since its original enactment in 1925 (Laws of 1925, pp. 428-432).

The question here is a question of the extent of the power delegated to the Legislature by the Act of Congress. That power is not enlarged,—nor the lack of power supplied,—by the fact that taxpayers may not have heretofore assailed the Act in its earlier form, with its more moderate rates.

D. It is wholly immaterial here that the Congress itself, under the broad powers given it by the Sixteenth Amendment, levies federal income taxes, surtaxes or excess profits taxes, and special taxes of various kinds, upon graduated progressive scales, taking higher incomes habitually at higher percentage rates than lower incomes. The Congress is not bound by any such iron rule of uniformity in income taxation, as it has seen fit to impose upon its creature, the Legislature of Puerto Rico, by the Organic Act, for all insular taxation of every kind.

The power given to the Congress by the Sixteenth Amendment to levy federal income taxes, is of the broadest character. The Amendment says:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The only restriction to be implied upon this broad grant of power, is that of "due process of law" guaranteed by the Fifth Amendment.

Under that broad grant, the Congress, driven by imperative war requirements, has levied income taxation at increasingly higher rates on the higher incomes.

But nevertheless the Congress, when, in 1917, by the War Revenue Act of that year (Sec. 5, Act of October 3, 1917, 40 Stat. 300, 302), it invested the Legislature of Puerto Rico (and that of the Philippines) with the

> "power by due enactment to amend, alter, modify or repeal the income tax laws in force in Puerto Rico or the Philippine Islands respectively",

did not choose to withdraw or to modify in any manner the limitation which it had imposed, six months earlier, on the Legislature of Puerto Rico, by the Section 2 of the Organic Act, approved March 2, 1917 (39 Stat. 951, 952, *supra*), "That the rule of taxation in Puerto Rico shall be uniform".

E. This is the more noteworthy, because this grant of power to the Puerto Rico Legislature to levy income taxes, thus independently within the Island, was made as a part of the very same War Revenue Act by which the Congress, in the immediately following sections of that statute, proceeded to levy the "War Excess Profit Tax", with progressively rising graduated taxes on incomes within the mainland, for the purposes of World War I then in progress.

Manifestly the purpose of the Congress was that the people of Puerto Rico should neither be subjected to such war taxation, nor be called upon thus to bear the costs of carrying on the war; but that, on the contrary, taxation in Puerto Rico should continue to be levied by the Legislature solely for local government purposes as specified in Section 3 of the Organic Act; and that, therefore, the limitation of uniformity in taxation prescribed by Section 2 of that Act should remain the rule in the Islands. That has never been changed.

The very fact of the emphasis which the courts have placed on the broad, almost unlimited, power of the Congress itself under the Sixteenth Amendment [*confer*, e.g., *Union Packing Co.* v. *Rogan*, 17 F. Supp. 934], points up and illustrates, rather than otherwise, the contrary effect of the limitation of the rule of uniformity in taxation which it has chosen to impose upon its delegate, the Legislature of Puerto Rico, for local purposes in the Island.

Many of the States in the Union having State constitutions under which their State Legislatures are not limited

to the rule of uniformity in taxation, but under which, on the contrary, the Legislature possesses broad, unlimited powers in this respect, as does the federal Congress, have followed the example of the Congress in imposing graduated income taxes, taxing higher incomes with progressively larger percentages.

F. But there are some other States, whose State constitutions do include a clause, or limitation, imposing upon the Legislature the requirement of uniformity in taxation.

In some of those States the question has arisen as to the power of the Legislative, in view of that limitation, to levy such progressive graduated income taxes. In some of those States the limitation of uniformity is imposed only with reference to property taxes, and not upon excise taxes; and hence, in some of them, a discussion has arisen in the courts as to whether the income tax is to be considered a "property tax,"[29] or as an "excise tax," and some courts, considering it the latter, have held that the Legislature is not prevented by the requirement of uniformity in direct taxes, or property taxes, from levying *excise taxes* at varying rates upon higher incomes on a graduated scale.

But in other States, where the courts have taken the view [like this Court] that the income tax is a property tax, it has been held that the constitutional requirement of uniformity in taxation forbids such discrimination among taxpayers, in levying property taxes, based merely on differences in the aggregate amounts of their respective incomes.

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[29] As it was held to be by this Court in *Pollock* v. *Farmers Loan and Trust Company, supra,* 157 U. S. 429, 553, *et seq.;* and (rehearing), 158 U. S. 601, 637.

It has been so held, for instance, in the following States:

ALABAMA :

Eliasberg Bros. Merc. v. *Grimes,* 204 Ala. 492; 86 So. 56 [1920].

ILLINOIS:

Bachrach v. *Nelson,* 349 Ill. 579; 182 N. E. 909, 915 [1932].

PENNSYLVANIA:

Kelley v. *Kalodner,* 320 Pa. 180; 181 Atl. 598 [1935].

TENNESSEE:

Evans v. *McCabe,* 164 Tenn. 672, 52 S. W. (2d) 159 [1932].

WASHINGTON:

Cullerton v. *Chase,* 174 Wash. 363; 25 Pac. (2d) 81 [1933].

G. *Plainly the line of decisions applicable here,*—with relation to the power of the Legislature of Puerto Rico, under the strict limitation imposed by the Congress, "That the rule of taxation in Puerto Rico shall be uniform,"—and in view of the decision by this Court, which likewise binds the Legislature in this respect, that in interpreting Acts of Congress, and in the view of the federal courts, "income" is to be regarded as property, and "income taxes" as "property taxes,"—and in view also, particularly, of the broad character the requirement of Section 2 of the Organic Act, imposing the rule of uniformity alike upon all taxation in Puerto Rico (not upon property taxes only),—*is the line of cases cited in the last preceding sub-paragraph decided by the courts of those States where "income" is similarly regarded as "property," and "income taxes" as "property taxes," and which hold accordingly, that under constitutional provisions requiring "uniformity" in taxation, the Legislature is without power to levy income taxes on a progressive graduated scale levy-*

ing higher percentage rates upon higher incomes, and thus discriminating between individual taypayers, upon the basis only of differences in the amounts of their aggregate incomes.

Those decisions are directly in point here. The insular Supreme Court, as well as the Circuit Court of Appeals, should have followed them, and should, therefore, have held both Section 12 and also Section 13 of the Puerto Rican Income Tax Act, as amended by the 1941 amendments, levying these progressive graduated scale taxes, to be beyond the power of the Legislature of Puerto Rico, and void.

H. The insular Supreme Court in declining to follow that line of State decisions and in upholding Sections 12 and 13 of the Puerto Rican Act levying the progressive graduated income taxes, placed its decision upon four grounds (R. 21-22). It wholly ignored all of the State decisions; and held: (1) That it should disregard the decisions of this Court in *Pollock* v. *Farmers Loan and Trust Company, supra,* 157 U. S. 429, 553 *et seq.* (*decision on original argument*), and 158 U. S. 601, 618, 622, 628, *et seq.*, 637 (*on rehearing*), on the ground that "its *ratio decidendi* has fallen by the wayside"[30]; (2) That it is immaterial, in any

[30] *Citing Graves* v. *N. Y., ex rel. O'Keefe,* 306 U. S. 466, 480; which, however, does not support the insular Court in this; and does not even mention the *Pollock* v. *Farmers Loan and Trust Co.* case, nor the question as to whether or not "income" is property, or "income taxes" property taxes. The *Graves* case holds only that a New York State non-discriminatory tax on income, applicable to salaries, as applied to the salary of an employee of a federal agency, is not a tax on the federal agency itself; that (306 U. S. *supra,* at p. 480):

> "It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. * * * The theory, which once won a qualified approved, that a tax on income is legally or economically a tax on its source, is no longer tenable, * * *, and the

event, whether the tax is a direct tax or an excise (R. 21)[31]; that (3) the only meaning of the requirement "That the rule of taxation in Puerto Rico shall be uniform," is *geographical*, requiring only that "a tax shall apply in the same manner everywhere within our borders"; and (4) That the decision of the Circuit Court of Appeals, First Circuit, in *Domenech* v. *Havemeyer*, 49 F. (2d) 849, 852, and the former decision of the insular Court itself in *Loiza Sugar Co.* v. *Domenech, Treasurer*, 43 P. R. Rep. 855, 857-858, "have no bearing on this particular problem" (R. 22).

The insular Court's disregard of this Court's decision in *Pollock* v. *Farmer's Loan & Trust Co.*, is simply not justified by anything in the *Graves-O'Keefe* case, upon which the insular Court relies, as indicated in the margin here (footnote 30, *ante*, pp. 51-52).

Here again the insular Court has simply refused to be bound by the authority of a decision of this Court. Its error is plain. It is not for the insular Court to "whittle down" a decision of this Court.

The insular Court places its assertion (R. 21-22) that it is immaterial whether the tax is a property tax, or is an excise, upon the theory that that distinction (R. 21):

> "involves a problem which is peculiar to the Federal system. This is because the only constitutional requirement which flows from a finding that a tax is a

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only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government" * * *

That has nothing to do with this case.

[31] With which we agree, since Section 2 of the Organic Act broadly extends the requirement of uniformity in Puerto Rico to all taxation, of every kind—unlike most of the State constitutions, which usually restrict the requirement to property taxes, or direct taxes, only.

> direct one is that it shall be apportioned according to population (Article 1, Section 9 of the Constitution of the United States). But that requirement has no reference to insular tax legislation in which it is provided that a tax shall apply in the same manner everywhere within our borders. We therefore obtain no guidance from the effort to label the income tax herein as a direct tax";

and that (R. 22):

> "As the statutes involved herein do not provide for different rates of taxation at different places within Puerto Rico but provide only for higher rates at higher income levels, we find no violation of the rule for uniform taxation in Section 12 and 13."

It will be observed that the insular Court's reasoning in support of its doubtful proposition [or two propositions], which we have designated here as its reasons numbered "(2)" and "(3)" above [*ante*, pp. 51-52] really runs together, rather confusingly, into one proposition; viz., that, as the insular Court apparently understands, (a) the difference between direct taxes and excises "is peculiar to the Federal system" and is of importance only "because the only constitutional requirement which flows from a finding that a tax is a direct one is that it shall be apportioned according to population" of the several States of the Union;[32] and (b) that the distinction is of importance in federal taxation only because if the tax is a direct one it must be apportioned according to the census or enumeration [except the federal income tax, by virtue of the Sixteenth

[32] But that is an amazing statement. The difference between direct taxes and excises runs all through the law of taxation, and is apparently recognized everywhere, in the legislation of all of the States of the Union and of their subdivisions, for many purposes. It is plainly recognized in the legislation of Puerto Rico, and has been from the earliest days of the United States sovereignty there. For example, the Excise Tax Act, the "Internal Revenue Law of Puerto Rico," Act No. 85 of August 10, 1925, as amended (one section of which was before the

Amendment]; whereas, otherwise (R. 21): "If it is a duty, impost, or excise, it shall be uniform throughout the United States;" and (c) the insular Court thereupon concludes (R. 21-22) that, because this Court has held that the constitutional provision in Section 8 of Article I of the United States Constitution, in view of the way it is used in the Constitution and its context there, relates only to geographical uniformity throughout the Union,—as it plainly does,—that, "According to the settled doctrine, the uniformity exacted is geographical, not intrinsic;[33] and that "The rule of liability shall be the same in all parts of the United States;[34] therefore, it follows that the requirement made by the Congress in Section 2 of the Organic Act "That the rule of taxation in Puerto Rico shall be uniform", likewise relates only to geographical uniformity.

Non sequitur. There is nothing whatever either in the phraseology or in the context of this provision, Section 2 of the Organic Act, indicating any intention by the Congress so to limit the meaning of the word "uniform"; and it has never heretofore been so understood. (*Confer* the decision of the Circuit Court of Appeals, First Circuit, in *Domenech* v. *Havemeyer,* 49 F. (2d), 849, 852; and that of the Supreme Court of Puerto Rico itself in *Loiza Sugar Co.* v. *Domenech, Treasurer, supra,* 43 P. R. Rep. 855, 857-858. And *confer* also the decisions of the Circuit Court of Appeals in *Gallardo* v. *Porto Rico Ry. Light and Power Co.,* 18 F. (2d) 918, 923 "[10]" and in *Sanchez Morales & Co.* v. *Gallardo,* 18 F. (2d) 550, 551-552).

Circuit Court of Appeals in *San Juan Trading Co.* v. *Sancho Bonet, Treasurer, supra,* 114F. (2d) 169), is legislation of a wholly different character from the law concerning direct taxation of real and personal property [Title IX, "Revenues" Sections 285 *et seq.,* of the Political Code], as well as from the Income Tax Act here under consideration.

[33] *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 583; cited by the insular Supreme Court (R. 21).

[34] *Florida* v. *Mellon,* 273 U. S. 12, 17; quoted by the insular Court (R. 21-22).

The insular Supreme Court cites (R. 22) in support of its holding that the requirement that the rule of taxation in Puerto Rico shall be uniform, means only geographical uniformity,—that "a tax shall apply in the same manner everywhere within our borders",—the decision in *San Juan Trading Co.* v. *Sancho Bonet, Treasurer, supra,* 114 F. (2d) 969, 972, relating to the tax on matches. But there is nothing in that decision supporting this proposition of the insular Court in the present case. All that the Circuit Court of Appeals said on that point in the *San Juan Trading Co.* case was that the tax there before this Court was "not obnoxious to the uniformity clause", because (a) that tax applied "equally in all parts of Puerto Rico", and because also (b) "all matches in each class are treated the same."

There is in that opinion no intimation whatever that *geographical uniformity* was considered the *only* type of uniformity required by that clause of Section 2 of the Organic Act. Indeed, the opinion indicates the direct contrary.

The insular Supreme Court waives aside the decision in *Domenech* v. *Havemeyer, supra,* 49 F. (2d), 849, 852, which had stricken down, for violation of this uniformity clause of Section 2 of the Organic Act, the "Excess Profits Taxes" clause of a former Puerto Rican Income Tax Act, No. 43 of 1921,—and also the decision, following it, of the insular Supreme Court itself in *Loiza Sugar Co.* v. *Domenech, Treasurer, supra,* 43 P. R. Rep. 855, 857-858,—on the ground that, as the insular Court says (R. 22), those decisions "have no bearing on this particular problem".

The insular Supreme Court wholly fails, however, to explain why it considers that those decisions have no bearing on this problem. It says only (R. 22, *supra*), "We have considered them carefully, but see no purpose in extending this opinion further by distinguishing them in detail". It makes no further comment upon them.

Those decisions are plainly in point. Their holdings are directly to the contrary of the insular Court's present theory as to the uniformity in taxation clause of Section 2 of the Organic Act being so limited in meaning as to require only geographical uniformity. They strike down the "Excess Profits Taxes" provision of the 1921 Act,—not at all because of any lack in it of geographical uniformity throughout the Island,—but on the contrary, on the sole ground of lack of uniformity in the incidents of the graduated progressive "Excess Profits Tax", on the sliding scale provided by Section 17 of that 1921 Act. The Circuit Court of Appeals there said, in *Domenech* v. *Havemeyer*, *supra*, 49 F. (2d) at page 852:

> "The taxes now sought to be recovered in all three suits are largely excess profits taxes. We think them condemned by section 2 of the Organic Act (39 Stat. 952. [48 USCA. 737], which requires the Legislature of Porto Rico to make its taxes uniform."

This was followed and quoted word for word by the insular Supreme Court itself in a case before it fifteen months later [July 26, 1932, *The Loiza Sugar Co.* case, 43 P. R. Rep., *supra*, 855, 857]. There is not a word there about mere geographical uniformity.

It is true that the particular form of discrimination and lack of uniformity, on account of which the Circuit Court of Appeals for the First Circuit struck down the "Excess Profits Taxes" of the 1921 Act, was that the sliding scale in that Act was so constructed as to be in itself a particularly flagrant violation of the rule; and, therefore, that to point that out was as far as that Court needed to go in that case[35] [or the insular Supreme Court, in the following *Loiza Sugar Company* case].

But those holdings necessarily implied the corollaries without which they could not have been made: (1) That the requirement of Section 2 of the Organic Act of a "uniform"

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[35] *Domenech* v. *Havemeyer*, *supra*, 49 F. (2d) 849, 852.

rule of taxation in Puerto Rico was not merely geographic in character requiring a tax to be made applicable throughout the entire area of the Island, but that the requirement was also applicable to prevent discriminations among taxpayers themselves, and so, was applicable to such a discrimination, for example, as the one this Court struck down in that case; and also (2) That discriminations among taxpayers, based only on the total amounts of their respective incomes, constituted violations of the rule of uniformity.

The requirement is not merely that the rule of taxation in Puerto Rico shall be *reasonably* uniform, or that it shall be *more or less uniform;* but it is absolute, that it shall be "uniform",—without any degrees of uniformity about it. It says nothing whatever, either expressly or by implication, about any sliding scale of taxation of incomes, at all.

Point III.

The taxation of stockholders on dividends received by them from domestic corporations is double taxation, and violates the requirement of Section 2 of the Organic Act, "That the rule of taxation in Puerto Rico shall be uniform".

A. Prior to these 1941 amendments, stockholders of domestic corporations were expressly allowed credits, for the purpose of the normal tax, of amounts received as dividends from corporations (Acts of 1925, Sec. 18-(a); *ante*, p. 5); but this was reversed by these 1941 amendments, both by striking out that provision of Section 18-(a), and also by expressly providing, in the amendment of Section 12-(a), "that said normal tax may also be assessed and collected on the income received by shareholders for dividends."

B. These 1941 amendments, however, not only retain, but increase to a flat rate of seventeen (17%) or nineteen (19%) per cent per annum, the tax levied directly in the

first instance on the net income of the corporations themselves (Sec. 28; *ante*, p. 4). This of course results, in effect, in *double taxation* of the individual stockholders on the income accruing upon their investments in the capital stock of any corporation, in association with the other stockholders of the corporation, on the business or investment in which the money is ventured in this collective form.

C. An individual investing his money directly in his own name in a business enterprise operating right alongside of a corporation, and doing the same kind of business, is taxed only once on the income realized by the venture. This *double taxation* of a person who has chosen to invest his money along with other individuals as stockholders in a corporation is not only "double taxation," in itself, but is *a direct violation of the rule of uniformity in taxation which the Congress has imposed as a limitation upon the taxing powers of the Legislature of Puerto Rico.*

D. The insular Supreme Court in upholding these 1941 amendments, in this respect (R. 23-24) relies simply on decision of this Court that "the receipt of dividends from a corporation is an event which may constitutionally be taxed either with or without deductions * * * even though the corporate income which is their source has also been taxed.[36]

But the insular Supreme Court apparently wholly fails to note that all of those decisions dealt either with the powers of the Congress itself, or else with the powers of State Legislatures where it did not appear that the Legislature was bound by any such iron rule of uniformity in taxation as the Congress has chosen to impose upon the Legislature of Puerto Rico by the provision in Section 2 of the Organic Act.

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[36] *Welch* v. *Henry*, 305 U. S. 134, 145-146; *Wisconsin* v. *J. C. Penney Company*, 311 U. S. 435, 442, *et seq.*; *Lynch* v. *Hornby*, 247 U. S. 339; *Helmich v. Hellman*, 276 U. S. 233; *United States* v. *Hudson*, 299 U. S. 498, 500.

E. The Congress itself is bound, in this respect, only by the provision of the Fifth Amendment forbidding the taking of property without "due process of law"; which, even if it implies the requirement of "equal protection of the laws", does not imply any requirement of an iron rule of uniformity in taxation. For example, this Court said in one of the cases relied upon here by the insular Court itself[37] (R. 23):

> "It is a commonplace that the equal protection clause does not require a State to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity".

That was said with reference to the equal protection clause in the Fourteenth Amendment, which binds the State Legislatures, but does not bind the Congress nor the federal Government; which, as above noted, is bound only by the Fifth Amendment containing no express "equal protection" clause.

F. But for Puerto Rico the Congress, the supreme legislature for the Territory, under its constitutional power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Art. IV, Sec. 3, Clause 2), has seen fit to impose on the Territorial legislature the positive requirement that in the making of laws for the Territory, it shall not only observe the mandates of not depriving any person of property "without due process of law", and of the "equal protection of the laws", but, also, specifically, that it shall observe the absolute requirement "That the rule of taxation in Puerto Rico shall be uniform."

Obviously this is a much more stringent requirement than that simply of the "due process of law" clause in the Fifth Amendment, the only thing that binds the Congress itself in this respect.

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[37] *Welch* v. *Henry, supra*, 305, U. S. 134, 145.

Point IV.

Taxation of members of partnerships on partnership profits distributed to them, after the partnership as a unit has already been taxed on the same profits, is, even more flagrantly, not only "double taxation" on the same profits, and a violation of the rule of uniformity in taxation which the Congress has seen fit to impose upon the Legislature of Puerto Rico, but also a taking of property without due process of law and denial of the equal protection of the laws.

A. The same considerations apply here that are stated in the preceding Point III with reference to such double taxation of dividends received from stockholders of corporations.

B. But the violation is not only that it is double taxation of these profits, a violation of all of the established principles of proper taxation, but that, even more flagrantly than in the case of dividends received from corporations, it is a violation of the positive requirement of the rule of "uniformity" in taxation, specifically imposed on the local Legislature by Section 2 of the Organic Act.

C. *There is a manifest difference here between corporations and partnerships.* The corporation exists only by the grant of the sovereign, by a specific grant of a charter by the legislature, or by the executive through legislative authority—as for instance by virtue of a general corporation law, as in Puerto Rico, and likewise in the States of the Union.

The partnership, on the other hand, exists solely by the will of its own members. It requires no charter or license from the sovereign. As was pointed out by the Supreme Court of Tennessee in its above quoted decision in *Corn* v. *Fort*, 170 Tenn. 377; 95 S. W. (2d) 620, 623 (*ante*, p. 34), simple or unlimited partnerships, like individuals,

> hold no franchise or special privilege conferred by the sovereign not belonging to citizens generally of

common right. The right of individuals to combine their activities as partners is independent and antecedent to government."

D. In Puerto Rico partnerships are recognized and regulated, by the provisions of the Civil Code (Edition of 1930, Title VIII—"Partnership", Sections 1556-1599), and the Code of Commerce (Arts. 125, *et seq.;* Appendix, *infra,* pp. 103-106); but those provisions, based on and largely repeating corresponding provisions in the Civil Code of Spain, inherited in substance from ancient civil law,—[the Code of Commerce is the Spanish Code itself],—do not require any license, charter, or grant from the sovereign authority,—or from the *quasi*-sovereign government of Puerto Rico,—as does a corporation, whether organized under the general Corporation Law of Puerto Rico (the Act of March 2, 1902, Revised by the Act of March 9, 1911, Rev. Codes and Stats. of 1911, Title I, "Private Corporations", Pars. 407 *et seq.*); or under the ancient provisions of the Civil Law, recognized in the Civil Code.

E. The insular Supreme Court, however, brushes this essential difference between the corporation and the partnership aside, by saying simply (R. 24):

> "But the term 'partnership' is not used in our Income Tax Act in the common law sense. It is a translation of the term '*socieded*' found in the civil law. And a *socieded* is a juridical person apart from the members thereof. *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476. There is therefore no constitutional objection against assimilating a partnership or *sociedad* to a corporation for tax purposes, and taxing both the partnership and its individual members on the same income. *Fantauzzi et al.* v. *Bonner,* 34 P. R. R. 464, 474. To compare our situation with that obtaining under the Federal Income Tax Act as applied to a common law partnership, which under that Act is not treated as a separate entity, except for accounting purposes, and which therefore pays no tax as such, is to invoke a false analogy.

F. —(1) In this statement, the insular Supreme Court overlooks at least two essential elements: (a) The difference, under laws of Puerto Rico, between the different classes of partnerships recognized by the Code of Commerce and the Civil Code, substantially as inherited from the laws of Spain. (*Confer,* Code of Commerce, Book II, Title 1, Section II, "*General Co-Partnerships*", with *ibid.,* Section III, "*Limited Co-Partnerships,*" and Civil Code, *supra* (Ed. of 1930), "*Partnerships,*" Secs. 1566 et seq.); and (b) The very sharp difference in many essentials between the general partnership, or ordinary civil partnership on the one hand, and on the other hand, those types of the civil law *sociedad* which are usually referred to in English translations as "limited partnerships," or "limited co-partnerships,"[51] that is to say the "*sociedad en comandita*" and the "*sociedad anónima,*" which partake, respectively, in essence, rather of the characteristics of such organizations as the "partnership associations" of Pennsylvania and of Michigan, and of the ordinary private business corporation, than of those of an ordinary partnership; whereas the ordinary general partnership in Puerto Rico, under the Civil Code and the Code of Commerce, is analogous in essential respects to the ordinary common law partnership.

The partners are liable for its debts, share in its profits, and take part in its management. (Code of Commerce, *supra,* Arts. 127, 129; Rev. Stats. & Codes of 1911, Pars. 7686, *et seq.;* Appendix, *infra,* pp. 89-90.)

G. *The insular Supreme Court also plainly overlooked* in this connection, in saying (R. 24):

> "But the term 'partnership' is not used in our Income Tax Act in the common law sense. It is a translation of the term '*sociedad*' found in the civil law,"

the fact that the Legislature, in enacting by this amendatory Act No. 31, of April 12, 1941, *these amendments* to the Income Tax Law, *so changed and broadened the definition of*

the term 'partnership,' *for the purposes of the Act, as, expressly, to make it include,* in addition to all the ordinary types of partnership or "*sociedad,*" (Sec. 2-(a)-(3) [*ante,* p. 4], also:

> "And it shall include, further, two or more persons, under a common name or not, engaged in a joint venture for profit."

In other words, the Legislature expressly defines the term, for the purposes of these 1941 Acts, as including ordinary common law partnerships, as they are known here in the mainland; and also, even further than that, all simple joint ventures.

H. That is to say, if John Smith and Bill Jones, for example, join in buying a herd of cattle and ship them to market, and sell them at a profit, and then divide the profits [although without any further joint transactions between them, or further partnership of any sort], they will, under these amendments to the Income Tax Law of Puerto Rico, be taxed, *first,* nineteen percent (19%), as a "partnership," on their partnership profits, under Section 28 of the Act as thus amended,—[or, possibly, only seventeen (17%) percent, if treated as a "domestic partnership" under that section]; and then, *second,* taxed in addition a second time as individuals, upon their respective shares of their remaining "partnership profits" distributed to them, after having already deducted the nineteen per cent [or 17%] already thus taken from them as "partnership profits."

I. Most plainly, this is violation of the rule of uniformity in taxation required by Section 2 of the Organic Act,—[as well as unreasonable classification, amounting to deprivation of property without due process of law, and denial of the equal protection of the laws].

If, in the supposed case, John Smith and Bill Jones, instead of joining together in purchasing this herd of cattle,

had each one gone out by himself, individually, and bought one-half of the herd, and shipped it in the same way, and had individually marketed his own half; then he would not have been taxed doubly. There would then have been no taxation of so-called "partnership profits"; but only his own tax as an individual on his own gain that he had thus made on his half portion of the herd.

Point V.

The Legislature of Puerto Rico does not passess the power [without directly amending the community property laws] to levy the income tax against the husband alone upon the entire aggregate income of the conjugal community.

A. The provision (*ante*, pp. 3-4) of Section 13 of the Act No. 31 of April 12, 1941, amending section 24-(b) of the former Act of 1925,—[which had recognized, in accordance with the community property laws of Puerto Rico, the right of husband and wife, living together, each to make his and her own separate income tax returns if they saw fit, and each to be taxed separately on such separate returns for **one half of the community income**], so as now to provide, to the direct contrary [Appendix, *infra*, p. 100]:

> "(b) If a husband and wife living together have a net income for the taxable year of $2,000, or over, or an aggregate gross income for such year of $5,000 or over, the total income of both shall be included in a single joint return, and the normal and additional tax shall be computed on the aggregate income. The net or gross income received by any one of the spouses shall not be divided between them,"

are likewise violative of the rule of uniformity in taxation; and are also a deprivation of property without due process of law, and a denial of the equal protection of the laws; and are *an attempt to amend the community property laws* of Puerto Rico, embodied in Sections 91-93, 1267-1268, 1295-

1333 of the Civil Code, and elsewhere, or to repeal them to that extent, *by implication*, without expressly repealing them, or amending or reenacting them as amended, in the way required by paragraph 9 of Section 34 of the Organic Act, prescribing the method to be followed by the Legislature in amending statutes, and requiring that "so much thereof as is revived, amended, extended, or conferred shall be reenacted and published at length".

This amendment of Section 24-(b) very greatly increases the tax liability of husband and wife, if (1) they live together, and if (2) the aggregate of their joint incomes amounts either (3) to a "net income" of $2,000 or over, or (4) to "an aggregate gross income" of $5,000 or over; because under the graduated sliding scales prescribed for both the normal tax and for the surtax it results: (*a*) That the single tax thus levied on the aggregate of their separate incomes, so taken jointly and considered as a unit as the basis for taxation under the sliding scales, is very greatly increased over the sum of the two separate taxes which each would pay, if they were taxed separately on their separate incomes; and, therefore, over the sum of what they would pay if not living together [or if unmarried]; and (*b*) moreover the assessment of the entire tax against the spouse making the single return (whether husband or wife) in effect amounts to taxing that spouse individually upon not only his or her own property,—his half share in the community property income,—but also upon the property of the other spouse,—the half share belonging to the other spouse in the community income.

B. Under the community property laws of Puerto Rico,—as under the community property system generally, wherever that system is in force, as it is in some of the States in the United States, derived from the laws of Spain or of France,—all income received by either spouse [except through gift, legacy, or descent, or by right of redemption or by exchange for other property belonging to one of the

spouses only] falls into the community property and is owned share and share alike by the two spouses. And, while the husband is the manager of the property, much in the same way as a board of directors is the manager of the property of a corporation, or as the managing agent or director of any other partnership [or *"sociedad"* under the civil law of Puerto Rico and other civil law jurisdictions] is the managing agent of the partnership, yet that does not mean that he is the sole owner of the partnership or of the "community" property. The wife has an undivided one-half interest in it; and whether or not that interest is to be considered as technically "vested",[38] it is in any event a definite ownership. The half interest belongs to her. It is her property. This is not a rule of procedure, merely; but is a rule of substantive property[39] law, especially where the income is from earnings.

C. As above indicated, the provisions of the Civil Code of Puerto Rico, and other laws of the Island embodying the community property system, were not amended or changed in any way by the 1941 amendments to the Income Tax Law; and they cannot be regarded as amended by implication by the amendments to the tax laws; not only because (1) amendments or repeals by implication are not favored and are not to be implied in any case unless absolutely necessary, but also because (2) in Puerto Rico the Legislature is expressly forbidden by Paragraph 9 of Section 34 of the Organic Act, above mentioned, from so amending statutes of the Island by indirection.

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[38] A word borrowed from the technical terminology of the English common law conveyancing system, and not accurately reflecting, in reality, any concept of the Civil Law.

[39] "It is a fundamental postulate of the community property system that whatever is gained during coverture by the toil, talent or other productive faculty of either spouse, is community property." (*Hammonds* v. *Commissioner of Internal Revenue*, 160 F. (2d) 420, 422; C. C. A.—X).

Confer, *W. D. Johnson* vs. *Commissioner*, 1 Tax Court (U. S.) 1041.

D. It results, therefore, that the preexisting community property laws of the Island are to be regarded as remaining in full force in every respect, untouched and unaffected by these 1941 amendments to the Income Tax Law. And further that, therefore, the relationship between those community property laws of the Island and these 1941 amendments to the tax law is to be regarded as strictly analogous to the relationship between the community property laws of any State of the Union,—such as, for instance, California, or Washington, or Texas, or any other State having the community property law system,—and the federal income tax laws.

E. The community property laws of Puerto Rico, as above indicated, are embodied primarily in Sections 91-93, 1267-1268, and 1295-1333 of the Civil Code of Puerto Rico (Appendix, *infra*, pp. 84-89). The insular Supreme Court has itself held that they constitute "*the conjugal partnership * * * in an identical or similar form to that*" existing in the community law States of the Union; and that they give the wife "*something more than a mere expectancy*" in the community property (*ante*, pp. 32-33).

F. This Court, in construing and determining the effect to be given to the provisions of the federal Income Tax Act laying a tax "upon the net income of every individual",[40] has held that it does not empower or authorize the Internal Revenue Commissioner to require a single return from the husband [or wife] of the aggregate community income, or to levy a single tax on the aggregate community income of spouses living in a community property State where the local laws give a definite *ownership* interest in the community property to each of the spouses. This has been determined in cases coming from States

[40] Sections 210-(a) and 211-(a) of the Revenue Act of 1926 (26 U. S. C. A. Pars. 951, 952) concerning which this Court notes: "The language has been the same in each act since that of February 24, 1919, 40 Stat. 1057" (*Poe* v. *Seaborn*, 282 U. S. 101, 109).

having community property statutes closely analogous[41] to those of Puerto Rico.[42].

G. This Court appears never to have had occasion directly to determine the question of the *power* of the Congress to require a single income tax return of the entire aggregate community income in such cases, or to levy thereon a single tax upon the progressive sliding scale basis at a higher rate than upon the separate individual returns for husband and wife; because the Congress has never undertaken to override in that way the statutes of the community property States in the Union. To the contrary, it has several times directly refused to adopt amendments to the income tax laws repeatedly urged upon it at different times [*Confer, Poe* v. *Seaborn, supra,* 282 U. S. 101, 114-116, ROBERTS, J.[43]].

H. This Court, has, however, had occasion directly to decide the question of the power of a State Legislature in this connection, in circumstances quite analogous to those here presented with relation to the power of the Legislature of Puerto Rico. In *Hoeper* v. *Tax Commission,* 284 U. S. 206, 212-218, it was decided that the Legislature of Wisconsin was without power [in the absence of any direct amendment of the statutes of that State concerning the property

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[41] For the analogy, see *Casal* v. *Sancho Bonet, Treasurer,* 53 P. R. Rep. 609, 618; *infra,* p. 51.

[42] WASHINGTON: *Poe* v. *Seaborn,* 282 U. S. 101, 110-113. ARIZONA: *Goodell* v. *Koch,* 282 U. S. 118, 120-121. TEXAS: *Hopkins* v. *Bacon,* 282 U. S. 122, 125-127. LOUISIANA: *Bender* v. *Pfaff,* 282 U. S. 127, 130-132. CALIFORNIA: *United States* v. *Malcolm,* 282 U. S. 792, 793-794 (Reversing the rule of the earlier case of *United States* v. *Robbins,* 269 U. S. 315, with relation to California, because, as this Court specifically states (at p. 794) "of amendments of the California statutes", since that case was decided).

[43] It has, however, by the 1942 Internal Revenue Act (Sec. 301-(b)-(2), 56 Stat., 798, 942), made the attempt with reference to estate taxes, as well as gift taxes, and insurance taxes,—[held beyond its power by the Louisiana Supreme Court; appeal dismissed by this Court for lack of jurisdiction]. See *Flournoy* v. *Wiener,* 321 U. S. 253; 203 La. 649; and Judge Donworth's article in the April, 1944, Washington [State] Law Review; (*ante,* p. 16, footnote 23).

rights of married women] to levy a single tax on the combined income of the spouses, under a graduated scale of taxation, at a higher rate than would have been due from them if their taxable incomes had been separately assessed; this Court there saying (at p. 215):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment.[44] That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols* v. *Coolidge*, 274 U. S. 521, 540."

I. The insular Supreme Court in the present case directly refused to follow (R. 16-20) that decision of this Court in *Hoeper* v. *Tax Commission, supra.* The insular Court does not attempt to distinguish the *Hoeper* case in any way. It simply refuses to be bound by it, and argues that its authority is weakened or destroyed by comments of text writers and by what the insular Court thinks indications of a possibly different doctrine more recently growing up in this Court in decisions relating to gifts, assignments and trusts, more or less analogous to the question decided in the *Hoeper* case; and concludes (R. 20) by a direct questioning of "whether there was any validity left in *Hoeper* v. *Wisconsin*" [*sic; Hoeper* v. *Tax Commission, supra,*] "as a controlling authority."

J. *This was the clearest kind of error.* The insular Supreme Court possesses no authority to disregard the decisions of this Court in that way. Those decisions are binding upon the insular Court.[45]

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[44] For Puerto Rico, the Fifth Amendment, and Section 2 of the Organic Act.

[45] The Circuit Court of Appeals attempts to avoid the effect of this by saying (R. 63); "Since under Puerto Rican Community property law the income was that of the husband, there is nothing in *Hoeper* v. *Wisconsin* which would require

K. It follows that Section 24-(b) of the Income Tax Law of Puerto Rico, as amended by Act 31 of April 12, 1941, requiring that the total income of both spouses shall be included in a single joint return, and that the normal and additional taxes shall be computed on the aggregate income, and directing that neither the net nor the gross income received by any one of the spouses shall be divided between them,[46] if construed as amending or overriding the provisions of Section 12-(a), as amended by the same Act No. 31 in an earlier section and as again amended and reenacted a month later by Act No. 159 of May 13, 1941 [Appendix, *infra*, p. 94], so as to require the lumping of all of the income from both spouses [whether derived from community income or otherwise], as was attempted by the Legislature of Wisconsin in the statute before this Court in

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that the husband and wife be allowed to split this income between them for tax purposes".

But the insular Court does not hold,—and never has,—that "the income was that of the husband". The wife owns an interest in it which the insular Court says "*is something more than a mere expectancy*" (R. 13, *supra*), under a system which that Court holds "*exists in an identical or similar form*" [*Casal* case, *infra*, p. 51] to that existing in the State of Washington and the other States whose laws were before this Court for consideration in *Poe* v. *Seaborn*, *supra*, and its companion cases [ARIZONA, LOUISIANA, TEXAS; and CALIFORNIA also (*United States* v. *Malcolm*, *supra*) after its code had been amended subsequently to the way it had stood when the earlier *United States* v. *Robbins* case arose.

And it is significant that on the rehearing of the *De La Torre* case the insular Court expressly noted (*National City Bank* v. *De la Torre*, *supra*, 54 P. R. Rep. 651, 654-655, *supra*;

"Given the changes that have occurred in the institution in Puerto Rico, similar to those of California, we do not doubt in reality that the interest of the wife is something more than a mere expectancy and that it can be said that here, as well as in California, her interest in the property of the conjugal partnership is greater than that of a presumptive heir."

[46] This apparently requires that even income received by either spouse from gift, legacy, or descent, or in exchange for other separate property, shall be lumped with the community income for tax purposes.

Hoeper v. *Tax Commission, supra,* was beyond the power of the Legislature and is void.

It does not purport to amend the community property laws of the Island; and it cannot be considered as amending them by implication, in view of the prohibition in Section 34 of the Organic Act against amendment of Puerto Rican statutes in that manner, as well as in view of the general rule that amendments or repeals of statutes by implication are not favored in any case.

L. In any event section 24-(b) as thus amended by Act No. 31 of April 12, 1941, is controlled by the later enactment in Act No. 159, the following month, May 13, 1941, by which section 12-(a) of the Act was again amended and re-enacted, so as once more to re-enact exactly the same phraseology, in this respect, that had been used in the amendment of April 12th, and had also been used in the former Act of 1925, that:

> "There shall be levied, collected and paid for each taxable year *on the net income of every*" ["*individual*" (1925); "*citizen*" (Act No. 31)], "*person*" (Act No. 159).

L.—(1) That is the same phraseology used in the sections of the federal Income Tax Act which "lay a tax upon the net income of every individual" (*Poe* v. *Seaborn,* 282 U. S. 101, 109, *supra*); and which this Court had held in *Poe* v. *Seaborn, supra,* and in its companion cases (*ante,* p. 10, footnote 16) did not indicate any intention on the part of the Congress to override the community property laws of the States of the Union possessing such laws.

L.—(2) Act No. 159 of May 13, is a later expression of the Legislative will than Act No. 31 of the preceding month, and therefore controls it, where there is any conflict between them. This reenactment by the later Act of section 12-(a) in this respect, with the same phraseology as the earlier Act, thus expressly levying the tax "on the net income of

every person", conflicts with, and therefore overrides, the provision of section 24-(b) as it was amended by the earlier Act No. 31 of April 12, insofar as that Act may have intended to levy the tax on husband and wife, not individually "on the net income of every person", but, to the contrary, on the combined joint incomes of husband and wife lumped as one for tax purposes.

L.—(3) This void amendment of Section 24-(b) of the Act may be elided under the "saparability clause" in Section 27 of the same Act 31, without affecting the balance of the Act, because of its independent, separable character.

Point VI.

A. The insular Supreme Court correctly held that the *exception* contained in Section 12(a), as amended by Act. No. 159 of May 13, 1941, discriminating in favor of American citizens residing in Puerto Rico, as against non-resideni aliens, constituted a violation of the rule of uniformity in taxation in Pueto Rico required by Section 2 of the Organic Act, as well, also, of a denial of the "equal protection of the laws", and a deprivation of property "without due process of law."

A. That decision (R. 24-28) is amply supported by the authorities upon which that Court relied (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Hines* v. *Davidowitz*, 312 U. S. 52; *Truax* v. *Raich*, 239 U. S. 43, 42, *Ex parte* Kawato, 317 U. S. 69, 71 *et seq.*; *Edwards* v. *California*, 314 U. S. 160, 173-174; *Ex parte* Kotta (Cal.), 200 Pac. 957, 958; *Fraser* v. *M'Conway & Torley Co.*, 82 Fed. 257; *Juanita Limestone Co.* v. *Fagley*, 187 Pa. 193; 40 Atl. 977.

B. But the Insular Supreme Court Was in Error on Holding [and the Circuit Court of Appeals in not reversing it in this] (R. 29) that:

> "Our holding does not, of course, vitiate the entire tax imposed on the petitioner. He is entitled only to uniformity, or equal protection, which means that his

tax will be calculated at the same rate as that of resident citizens. *San Juan Trading Co.* v. *Sancho*, 114 F. (2d) 969, 75."

B.—(1). In so holding the insular Supreme Court fails to notice the radical difference between the statute before the Circuit Court of Appeals in the *San Juan Trading Company* case, and the statute here involved. The Insular Court says nothing further upon this point. Its discussion of it is confined to the five lines above quoted. It relies wholly upon the Circuit Court of Appeals' decision in the *San Juan Trading Company* case.

C. The general rule is well settled, as to the effect of finding that a part of a statute is beyond the power of a legislature, and therefore void. It was concisely stated by CHIEF JUSTICE FULLER, in delivering the opinion on the rehearing of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 635-636:

> "It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us, there is no question as to the validity of this act, except sections * * *; and as to them we think the rule laid down by Chief Justice Shaw in *Warren* v. *Charlestown*, 2 Gray 84, is applicable, that if the different parts
>
> 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.'
>
> "Or, as the point is put by * * *. And again, as stated * * * in *Spraigue* v. *Thompson*, 118 U. S. 90, 95, where

it was urged that certain illegal exceptions in a section of a statute might be disregarded, but that the rest could stand;

> 'The insuperable difficulty with the application of that principle of construction to the present instant is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in view of the illegality of the exceptions.' "

D. The gist of the lower courts' holding (*ante*, pp. 9-10, 21-22) is that the only effect to be given to the invalidity of that exception is to substitute the rates stated in the *exception* for the principal rule stated in the main clause of the section, and thus to reduce the tax rate for all residents of Puerto Rico to the rate named in the *exception* for American citizens resident in the Island; instead of holding that the effect of finding the exception discriminatory and therefore void was either: (a) Simply to strike down the exception, leaving the balance of the Section to stand as enacted by the Legislature, thereby fixing a uniform rate of 8 per cent per annum for all residents of Puerto Rico, alike;[47] or else (b) To strike down the entire Section, because of the improbability of the Legislature having ever enacted the main clause itself in its present form, if it had realized the invalidity of the discrimination made by the exception in favor of American citizens, and because of lack of power in the Court to re-mold the whole enactment [in addition to striking out the invalid exception clause] in such manner as the Court might assume, *or guess*, that the Legis-

[47] Disregarding, for the present, the discrimination against non-residents of Puerto Rico, and also the further discrimination, as among non-residents themselves between those who are American citizens and others; which is not directly involved in this case, since this appellant was an alien resident in the Island.

lature might have enacted it, if it had realized the invalidity of the discriminatory exception. That is really the exercise of legislative action, beyond the power of a court.

The earlier decision of the Circuit Court of Appeals in the *San Juan Trading Co.* case [48] upon which the insular Supreme Court relies (R. 29), —and which the Circuit Court itself now cites in this connection (R. 66),—fails to support it in this respect. Both those Courts fail to notice the radical difference between the statute before the Court in the *San Juan Trading Co.* case, and those here involved.

Point VII.

The later November, 1941, amendment to Section 3 of the Income Tax Act limiting the retroactivity to the beginning of the calendar year 1941, relieved petitioner of retroactive liability for the additional 1940 taxes under the earlier April amendments of that same year.

A. Section 3-(a) of this Income Tax Act as it was further amended by the later amendatory Act No. 23 of November 21, 1941, enacted at the special session of the Legislature that year (Laws of Puerto Rico, Special Session, 1941, pp. 72, 74, (supra) expressly limits the retroactivity of the Act to "the calendar year 1941, or any fiscal year ending during the calendar year 1941", and thereby excludes the calendar year 1940 from the retroactive effect of the Act, where, as in the present case, the taxpayer's fiscal year coincided with the calendar year so as not to run over in any way into the calendar year 1941

Section 10 of the November Act expressly repeals "All laws or parts of laws in conflict herewith"; and Section 11 declares "that there exist a necessity and an emergency for the retroactivity of this Act", and that its approval "shall take effect from and after January 1, 1941."

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[48] *San Juan Trading Co.* v. *Sancho Bonet, Treasurer*, 114 F. (2d) 969, 975, *supra.*

The rule is, of course, settled that an amendment of a statute, or an amendatory act, changing as here the phraseology of the earlier statute and directing that the earlier act (or section of the act, as here), "is hereby amended as follows", and then re-enacting the text as it is to read as so amended, *speaks as of the date of the original enactment of the act* (unless the amendatory act directs otherwise, as is not done here). [*Confer*: *Posadas* v. *National City Bank*, 296 U. S. 497, 503].

B. It follows that, upon this further amendment of the original Act by the November amendatory act, thus limiting its retroactivity to the calendar year 1941, beginning with January 1, 1941, that amendment carried back, in effect, to the date of the original Act, and automatically wiped out the retroactivity to 1940 of the amendatory provisions of the earlier amending Acts Nos. 31 and 159 of the preceding April and May, 1941; and thereby automatically wiped out whatever effect those April and May acts might otherwise have had upon the tax liability of this appellant upon his 1940 income, and thus wiped out the Treasurer's "reliquidation" of appellant's income taxes for that year 1940.

As Mr. Justice Holmes once said, "When the root is cut the branches fall." (*Smallwood* vs. *Gallardo*, 275 U. S. 56, 62).

(a) This result is not affected, either one way or the other, by the provision of Section 386 of the Political Code of Puerto Rico (Par. 3093, Rev. Stats. and Codes of 1911), directing that the repeal of any statute shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and that such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liabiilty.

(b) Manifestly, if regarded as applicable to the November, 1941, Act above, limiting the retroactivity of the income tax amendments to the calendar year 1941 with a view thus to saving the effect of the earlier April and May amendments (Nos. 31 and 159 at the regular session of that year above),—then, by the same token, those earlier amendments, made by those April and May Acts, must themselves likewise be regarded as not affecting the tax liabilities fixed by the earlier 1925 act which was in force when the income in question was received and the tax returns made upon it, and the taxes thereon originally paid in full on March 15, 1941. It is as broad as it is long. Either this provision of Section 386 of the Political Code does not affect a situation like this at all; *or else it carries clear through,* and is applicable not only to the November amendment at the Special Session, but also, equally, to the earlier April and May amendments. The result is the same, either way. Either the Code provision does not apply at all, in which case the November amendment at the Special Session is applicable, expressly limiting the retroactivity to the 1941 calendar year; or else the Political Code provision operates all the way through, so that neither the November amendment is applicable to those of April and May, nor are the latter April and May amendments themselves applicable as affecting the tax liabiilty incurred under the earlier statute of 1925 in force when the income was received and the original tax returns were made and the taxes paid in full thereon.

C. In this connection and throughout the consideration of all of the questions involved in this case of the construction and applicability of all these 1941 amendments to the insular income tax laws, the settled rule of *strict construction* in favor of the taxpayer is to be borne in mind that, as it has been phrased by one court (*Connelly* vs. *San Francisco,* 164 California 101; 127 Pac. 834, 836):

> "any attempt on the part of the State, or of the county as one of the subdivisions of the state, to take the prop-

erty of an individual for public purposes by way of taxation, must find an express statutory warrant, and all laws having this object are to be construed strictly in favor of the individual as against the State."

Point VIII.

These 1941 amendments to the Income Tax Laws of Puerto Rico, taken as a whole, are arbitrary and confiscatory, amounting to taking property for public use without compensation and without due process of law, and amounting also to an attempt to levy taxes for assumed "general welfare" purposes, rather than taxation for usual governmental purpose under the power delegated to the Legislature by the Congress by Section 3 of the Organic Act.

A. This point has been stated in the Petition. [Question 8, of "Questions Presented"; and see also "Additional Facts", Pars. 3, 4 and 5, and Footnotes 21 and 22; *ante*, pp. 30-31; 14-16.]

B. Without further elaborating it at this time, it is submitted that this question is one of very great importance, which apparently has not been directly decided by this Court, but should be.

C. It is believed perfectly plain that the Congress, in delegating usual taxing powers to the Legislature of Puerto Rico by Section 3 of the Organic Act, intended to grant only such usual taxing powers for governmental purposes as had been ordinarily exercised by State Legislatures; or as this Court said in *People of Puerto Rico* v. *Shell Company*, 302 U. S. 253, 261, quoting *Maynard* v. *Hill*, 125 U. S. 190, 204,

> "the subjects upon which Legislatures had been in the practice of acting, with the consent and approval of the people they represented".

D. The levying of tremendously increased taxes, away beyond the ordinary governmental needs, shown by the Gov-

ernment's revenues and its budgets [*ante*, pp. 15-16], is plainly not taxation for subjects upon which Legislatures had been in the practice of acting; but is manifestly an attempt to tax for some assumed purposes of "public welfare" not within the usual scope of ordinary governmental purposes.

E. The Congress has not seen fit to delegate to the Legislature of Puerto Rico the power of taxing to "provide for the * * * "general welfare of the United States", which the Congress itself may exercise under the first clause of Section 8 of Article I of the Constitution.

F. These 1941 amendments to the insular income tax laws, considered as a whole, are confiscatory; not alone because of the very radical increase made by the Acts of 1941 in the tax liability of everyone in the higher brackets subjected to the income tax; but also, and primarily, because of the discriminatory, as well as unnecessary and unwarranted, great increases in the taxation of alien residents of Puerto Rico; of partners in partnerships; of stockholders of domestic corporations; of non-resident taxpayers [classified again among themselves on the basis of whether or not they are American citizens]; as well as in the taxation of husband and wife living together.

Taking all of these things together, along with the sharp increases made in the graduated scales both of the normal tax and of the surtax for the relatively higher income tax classes, and also against the earnings of corporations and of partnerships,—all of these things taken together, along with the lack of any indication in the annual budgets of any reason for suddenly so requiring such greatly increased taxes against the higher incomes,— these 1941 amendments really amount to confiscation,—or to an attempt to tax for assumed "general welfare" purposes,—[Constitution, Cl. 1, Sec. 8, Art. I],—a power not delayed to the Legislature by the Congress,—rather than to taxation for the usual governmental purposes contemplated in the power delegated by

the Congress to the Legislature of Puerto Rico by Section 3 of the Organic Act [Appendix, *infra*, p. 83] that "taxes and assessments on property, internal revenue, and license fees, and royalties * * * may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Puerto Rico".

As already indicated [*ante*, p. 14] the insular Supreme Court itself recognized (R. 35-39) that there is here a very serious question whether these 1941 amendments can properly be sustained in view of their very manifestly confiscatory character, which is really apparent on their faces. Although upholding them against this charge, that Court appears nevertheless to have done so with considerable hesitation, as above indicated (R. 39; *ante, quotation*, pp. 30-31).

G. *Petitioner respectfully submits, to the contrary, that these very radical amendments do actually* "fall on the wrong side of the line"; *and are therefore void.*

The rule has been indicated by this Court in its outstanding decision upholding the constitutionality of the federal Income Tax Act of 1913 (*Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24-25) where it is said that if in any case it should appear that

> "although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, that is a taking of the same in violation of the Fifth Amendment,"—

and that in such a case the Act could not be sustained as a valid exercise of the legislative taxing power.[49]

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[49] See also the following cases reaffirming and following *Brushaber* v. *Union Pacific R. R.*, in this respect: *Nichols* v. *Coolidge*, 274 U. S. 532, 542; *Blodgett* v. *Holden*, 275 U. S. 142, 144; *Untermeyer* v. *Anderson*, 276 U. S. 440; *Hoeper* v. *Tax Commission, supra*, 284 U. S. 206, 215; and *Heiner* v. *Don-*

This is manifestly such a statute.

H. Striking down these 1941 amendments does not seriously affect the financial position of the insular government.

The only result is to leave in effect the former Income Tax Law of 1925, as it stood during the calendar year 1940 when the income here involved accrued and when the income taxes, both of the petitioner and of his wife, were incurred, and paid.

As above indicated (*ante*, pp. 15-16) the insular government's revenues under that former statute were amply sufficient,—taken together with its other sources of revenue,—more than to defray the actual expenses of carrying on the insular government. As there indicated, that government's annual surplus, under those statutes, had been constantly rising for the two preceding years; and was, for the fiscal year 1940-1941, during which these 1941 amendments were enacted by the Legislature, $4,404,557.09, as of June 30, 1941, as appears in the annual reports of the Auditor of Puerto Rico.

And, further, it appears (*ante*, pp. 15-16) that the annual budget adopted by that same legislature for the following fiscal year 1941-1942, for which provision was being made by these amendments to the tax laws, was only slightly above the budget for the preceding years.

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nan, 285 U. S. 312, 326. In the last case it is said (at p. 326, *supra*).

> "That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled."

CONCLUSION.

The decision of the Supreme Court of Puerto Rico and that of the Circuit Court of Appeals affirming it were both wrong, and should be reversed. The amendatory Acts of April and May, 1941, were beyond the power of the Legislature and void in the respects hereinbefore indicated; and the later November, 1941, amendments limited the retroactivity of the whole Income Tax Act to the calendar year 1941, so as, in any event, to exclude the 1940 taxes here in question.

And in view of the importance and the seriousness of the questions here presented by this case, it is earnestly believed, and is respectfully submitted, that this case should be reviewed by this Court; and that to that end the writ of certiorari should be granted.

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